No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF AMICI CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment imposes limitations on a jury's standardless discretion to assess punitive damages and to determine the severity of punishment in civil cases involving private parties?

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BRIEF AMICI CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 616 member life insurance companies, 435 of which hold licenses to conduct insurance business in Alabama. The ACLI's members currently hold 95 percent of the life insurance in force in legal reserve life insurance companies in the United States and 92.6 percent of such insurance in Alabama. The Health Insurance Association of America ("HIAA") represents the interests of 320 member companies that write over 85 percent of the health insurance written by commercial insurance companies in the United States; approximately 230 of those members hold licenses in Alabama.

The central issue in this case—whether the Due Process Clause of the Fourteenth Amendment imposes limitations on a jury's discretion to award and assess punitive damages—is vitally important to the members of the ACLI and HIAA. In recent years, courts have permitted juries to punish insurance companies, through substantial punitive damages awards, in the absence of due process constraints and have deferred to those awards even though they are excessive and bear no relationship to the plaintiffs' injuries. These decisions, like the decision below, drastically and unpredictably enlarge the risks facing insurers, who must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance policies. Because of their genuine interest in the constitu-

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[1] Counsel for both the Petitioner and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

tionality of current punitive damages law, therefore, the ACLI and the HIAA have filed several *amici* briefs in this Court in cases involving this issue. *See, e.g., Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

The ACLI and the HIAA thus file this brief to provide the Court with their unique perspectives, based on the experiences of their broad-based constituencies, on the constitutionality of punitive damages law and to offer additional arguments that underscore the importance of this Court's review.

STATEMENT

1. Petitioner, Pacific Mutual Life Insurance Company ("Pacific Mutual"), provides life insurance, but not health insurance, to employees of Alabama municipalities (Pet. App. B2). In 1981, Lemmie Ruffin, a non-exclusive insurance agent—in essence, an independent contractor for a number of insurers—approached Roosevelt City (the "City") and offered to provide health and life insurance to its employees through Pacific Mutual (*id.* at B1-B2). Ruffin told the City clerk and other City employees that he was "with Pacific Mutual" (*id.* at B2). He did not tell them that he also wrote policies for Union Fidelity Life Insurance Company ("Union Fidelity") (*id.*). Nor did he tell them that only Union Fidelity—and not Pacific Mutual—could provide health insurance to municipal employees (*id.*).

After consulting with the City clerk and the City's employees, Ruffin submitted an insurance proposal to the City on Pacific Mutual letterhead (Pet. App. B2). That proposal stated that he would place the City employees' *life* insurance with Pacific Mutual and their *health* insurance with Union Fidelity (*id.*). In response to the City clerk's inquiries, Ruffin represented (untruthfully) that Union Fidelity was a subsidiary of Pacific Mutual (*id.*).

In August 1981, the City accepted Ruffin's proposal and began to collect, through payroll deductions, insurance premiums from its employees (Pet. App. B2). Each month, Ruffin submitted an invoice to the City clerk on Pacific Mutual letterhead (*id.*). Periodically, Ruffin personally collected the City's premium payments (*id.*), having arranged for all communications between the City and the insurers—including all premium payments—to be exchanged through him (*id.* at B3). Ruffin, however, never forwarded the City's premium payments to either Pacific Mutual or Union Fidelity (*id.*). Thus, in late 1981, unaware of Ruffin's scheme, Pacific Mutual and Union Fidelity independently cancelled the City employees' policies for nonpayment of premiums (*id.* at B2-B3). Although Ruffin received cancellation notices from the insurers (*id.* at A2), he did not notify the City employees of the lapse of their insurance (*id.* at B3) and, instead, continued to accept their premiums (*id.* at A2, B5).

In January 1982, after Union Fidelity cancelled the City employees' health insurance, Cleopatra Haslip incurred $2,500 in hospital and medical expenses (Pet. App. B3). When the hospital could not confirm that Haslip had health insurance coverage through the City, it refused to discharge her from the hospital without a $600 partial payment of her expenses (*id.*). She then learned, for the first time, that her health insurance had lapsed (*id.*). Based on Haslip's experience, other City employees discovered that, despite their payment of premiums, their health and/or life insurance had lapsed as well (*id.* at A4-A6).

2. Haslip and several other City employees sued Pacific Mutual and Ruffin, but not Union Fidelity, in Alabama state court for fraud (Pet. App. B3). In August 1987, the jury returned a verdict for the plaintiffs and awarded damages to each of them (*id.*). It awarded Haslip, in particular, $1,040,000 in compensatory and punitive damages based on Ruffin's conduct (*id.*).

3. The trial court denied Pacific Mutual's motion for a new trial or for judgment notwithstanding the verdict

(Pet. App. A1). It concluded that the jury properly found that Ruffin was the agent of Pacific Mutual and that, under the doctrine of *respondeat superior*, Pacific Mutual was liable for his fraud (*id.* at A7-A8). It further concluded that the jury properly awarded punitive damages because Ruffin had "knowingly and intentionally committed fraud by collecting insurance premiums on cancelled policies and keeping the premiums for himself" (*id.* at A12). The court then declined to order a remittitur. Noting that the Alabama Supreme Court had outlined procedures for review of jury verdicts in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986),[2] it sustained the verdict because, in its view, "the conduct in this case evidenced intentional malicious, gross, or oppressive fraud" (*id.* at A14); the award was not excessive, even though it was "for a great amount of money" and even though the court "would in all likelihood have rendered a less[er] amount" (*id.* at A15); and the verdict was not based on "bias, passion, corruption, or other improper motive" (*id.*).

4. The Alabama Supreme Court affirmed. It agreed with the trial court that Pacific Mutual was liable for Ruffin's fraud under the doctrine of *respondeat superior*. It concluded that Ruffin acted within the scope of his agency when he defrauded the City's employees and that his acts were imputable to Pacific Mutual (Pet. App. B7-B9), even though Pacific Mutual does not write health insurance. The court rejected Pacific Mutual's argument that Ruffin had acted on behalf of another principal when he committed the fraud and thus had "abandoned" his agency with Pacific Mutual (*id.* at B8).

The court then sustained the punitive damages award, rejecting Pacific Mutual's arguments that the award was

[2] The *Hammond* decision requires trial courts to state for the record their findings of fact and conclusions of law regarding the excessiveness of jury awards and permits them to hold a post-trial, evidentiary hearing on that issue. *Id.* at 1379. *Hammond* further suggests that, in making this assessment, the court can consider such factors as the defendant's culpability, the need for deterrence and the impact of the award on the parties. *Id.*

unconstitutional (Pet. App. B12-B13). It relied on this Court's decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), to reject Pacific Mutual's Eighth Amendment challenge; it relied on prior decisions of the Alabama Supreme Court to reject Pacific Mutual's remaining constitutional challenges, including its due process challenge. The court noted that it had established certain "guidelines" for evaluating jury verdicts and protecting the due process rights of civil defendants (*id.* at B13, citing *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986)) and that the trial court had followed them. Thus, because "jury verdicts are presumed correct" (*id.*), the court affirmed the jury's award.

Two justices dissented from the majority's constitutional analysis. In their view, "the award of punitive damages in this case violate[d] [Pacific Mutual's] due process rights under the Fourteenth Amendment" (Pet. App. B16).

REASONS FOR GRANTING THE WRIT

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSES LIMITATIONS ON A JURY'S DISCRETION TO ASSESS PUNITIVE DAMAGES AND TO DETERMINE THE SEVERITY OF PUNISHMENT IN CIVIL CASES INVOLVING PRIVATE PARTIES RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE

This Court has recognized that the constitutionality of current punitive damages law, under the Due Process Clause of the Fourteenth Amendment, is an "important issue[] which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). This case presents a compelling setting for this Court to do so. Pacific Mutual timely raised its constitutional challenge to the assessment of punitive damages at every critical stage of the proceedings in the courts below; despite its challenges, the trial court permitted the jury to assess punitive damages against Pa-

cific Mutual with virtually no guidance as to either the propriety or amount of those damages; and the Alabama Supreme Court, with two Justices dissenting, declined to disturb the result of the jury's exercise of standardless discretion—the arbitrary punishment of an insurance company, without due process of law, based on the lapse of a health insurance policy that it did not write and based on the acts of a non-exclusive agent that it neither authorized nor condoned.

A. The Explosive Growth In Both The Number And Size Of Punitive Damages Awards, Rendered In The Absence Of Constitutional Safeguards, Is Compelling Confirmation Of The Need For This Court's Review

Current practices regarding punitive damages are neither time-honored nor logically related to traditional legal doctrines. *See* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-46 (1986). "It scarcely needs repeating that punitive damages are not a 'favorite of the law.'" *Smith v. Wade*, 461 U.S. 30, 87 (1983) (Rehnquist, J., dissenting). They are an historical anomaly, transported from eighteenth century England and nurtured by early American courts as a means of compensating, in small amounts, victims of libel, slander and similar tortious conduct where the victims' injuries were intangible and largely immeasurable. *See Day v. Woodworth*, 13 Howard 363, 371 (1851); *see generally* Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983).

From this small beginning, punitive damages awards have branched far beyond their origin in "insult" torts and far beyond the limits of their validity. Despite the steady expansion of the types of injuries, intangible or otherwise, for which the law now provides compensation, courts have nonetheless sanctioned a massive, and uncontrolled, expansion in both the frequency and size of punitive damages awards. Rather than confine these damages to certain intentional or malicious misconduct,

courts have sustained punitive damages awards in a broader spectrum of cases involving conduct that is, at most, very careless, grossly negligent or reckless—that is, conduct that "import[s] only a degree of negligence." *Smith v. Wade*, 461 U.S. at 61-62 (Rehnquist, J., dissenting); *see id.* at 38-41 & n.6; 1 L. Schlueter & K. Redden, *Punitive Damages* § 9.3(A), at 393-97 (1989). And they have sanctioned a wide range of results from juries who, left unguided, have exercised free reign to punish unpopular defendants with exorbitant punitive awards.[3] These developments are not unique to Alabama; punitive damages awards in virtually all jurisdictions are, in Justice O'Connor's apt words, "skyrocketing." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, Stevens, JJ., concurring in part and dissenting in part); *see generally* M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* at 14, 22-24 (1987).

Members of this Court have on several occasions expressed concern about current punitive damages law. On two occasions, a majority of this Court has voted to prohibit, or substantially limit, awards of punitive damages in certain types of cases. *See International Brotherhood of Elec. Workers v. Foust*, 442 U.S. 42 (1979) (no punitive damages for union's breach of its duty of fair representation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (no punitive damages in certain media defamation cases involving private plaintiffs). Chief Justice Rehnquist has expressed grave concerns that the imposition of punitive damages, based on varying standards of

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[3] The examples in the insurance field alone are staggering. *See, e.g., United American Ins. Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) ($1 million punitive award); *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 733 P.2d 1073, *cert. denied*, 484 U.S. 874 (1987) ($3.5 million punitive award affirmed); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988) ($5 million punitive award); *T.D.S., Inc. v. Shelby Mutual Ins. Co.*, 760 F.2d 1520 (11th Cir.) ($2.1 million award affirmed), *modified in part*, 769 F.2d 1485 (11th Cir. 1985).

negligence, is accomplished without adequate procedural safeguards. *See Smith v. Wade*, 461 U.S. at 61-62 (Rehnquist, J., dissenting). Justice O'Connor, joined by Justice Scalia, has also observed that a jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, Scalia, JJ., concurring). And, most recently, three other Justices of this Court, in addition to Justice O'Connor, expressed their views that the "skeletal guidance" provided to juries in assessing punitive damages poses serious due process concerns, at least in the absence of statutory guidelines. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring); *id.* at 2924 (O'Connor, Stevens, JJ., concurring in part and dissenting in part).

This case is an appropriate vehicle for the Court to address these due process concerns. None of the jurisdictional or prudential reasons that prompted this Court to "leave for another day" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)) the consideration of this issue in *Browning-Ferris*, *Crenshaw* and *Lavoie* exists in this case. Here, Pacific Mutual timely raised the constitutionality of punitive damages at each critical stage of the lower court proceedings and carefully preserved that issue for this Court's review. That review should be provided.

B. Only This Court, Applying The Precepts Of Due Process, Can Define The Constitutional Boundaries Of Punitive Damages Law

The decision below starkly reveals the constitutional flaws inherent in current punitive damages law. In this case, that law permitted a jury to decide arbitrarily to punish Pacific Mutual, based on the lapse of an insurance policy that it did not write and conduct that it did not know about, authorize or condone, and to determine the severity of that punishment with virtually no guidance

whatever. That same law permitted a reviewing court to sustain the jury's excessive punishment, even though it bore no rational relationship to Pacific Mutual's conduct and bore no proportionate relationship to any harm done. Because such standardless imposition of punishment flouts the very notion of constitutional due process—namely, " 'protection of the individual against arbitrary action' " (*Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted))—this Court should review the decision below to determine whether punitive damages procedures meet the constitutionally imposed " 'minimum requirements' " of due process. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), quoting *Vitek v. Jones*, 455 U.S. 480, 491 (1980).

1. *A Jury's "Standardless Discretion" To Award And To Assess Punitive Damages Is Inconsistent With Due Process*

"The idea that [due proces requires that] a jury should be given guidance in its decisionmaking is . . . hardly a novel proposition." *Gregg v. Georgia*, 428 U.S. 153, 192-93 (1976). But punitive damages procedure, as it now exists, affords no intelligible standards for a jury charged with deciding whether to award punitive damages and, if so, in what amount. That procedure is, on its face, constitutionally deficient.

(a) Current punitive damages law leaves the decision to award such damages to the sole discretion of a jury that, based on a mere preponderance of the evidence, has found a civil defendant liable under a subjective standard that may range from "maliciousness" to some degree of "negligence." Exercising their "wholly standardless discretion" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)), juries " 'may or may not make such an award' " (*Smith v. Wade*, 461 U.S. at 52 (citation omitted)); they make that decision "guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). This "deep[] flaw" (*id.*) of punitive damages law subjects

defendants to the whims of a jury and exposes them to punitive damages awards "frequently based upon . . . caprice and prejudice." *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).

This absence of discernible standards, moreover, forces civil defendants to speculate about the type of conduct that might subject them to punitive damages awards and about the likelihood that a jury will decide to impose such punishment. Thus, one jury may choose to punish a civil defendant with a substantial punitive award for "grossly negligent" conduct that a different jury, based on similar facts, would deem insufficiently offensive to warrant substantial, if any, punishment.[4] This prospect is far afield from the due process requirement of "fair notice or warning" of punishable conduct. *See Smith v. Goguen*, 415 U.S. 566, 572 (1974); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-500 (1982) ("quasi-criminal" ordinance with possible "prohibitory and stigmatizing effect may warrant a relatively strict [vagueness] test"); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2924 (O'Connor, Stevens, JJ., concurring and dissenting in part) (noting vagueness problems in the context of punitive damages law).

Equally deficient is the failure of current punitive damages law to define the parameters of the amount of punitive damages that a jury may award. "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at

[4] Such "shot in the dark" jury awards are common under a system that provides no standards to guide jurors. *See Charter Hosp. v. Weinberg*, 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990) (Houston, J., concurring specially). Under this system, two juries acting pursuant to substantially similar punitive damages instructions can reach drastically different results: "one jury awards $21,130.86, which is 15½ times the compensatory damages, to punish and deter . . . ; and another awards $2,490,000, which is 249 times the compensatory damages, to punish and deter . . . —for the same conduct." *Id.* (citations omitted).

87 (O'Connor, Scalia, JJ., concurring). On the contrary, jury discretion over the amounts of punitive damages "is limited only by the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. Thus, "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). This grant of "wholly standardless discretion to determine the severity of punishment" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)) results in wildly varying "windfall recoveries [that are] unpredictable and potentially substantial." *International Brotherhood of Elec. Workers v. Foust*, 442 U.S. at 50.

These flaws are plainly evident in this case. After finding Pacific Mutual liable under a liberal *respondeat superior* standard, the jury exercised its discretion to award punitive damages with little more guidance than to "do what you think is best." Told that, in its "discretion," it could award punitive damages, the jury penalized—and stigmatized—Pacific Mutual with an arbitrary award of punitive damages that it had no reason to expect. Left to its own devices to mete out the level of punishment after considering "the character and degree of the wrong . . . and the necessity of preventing similar wrongs," the jury punished Pacific Mutual in an amount in excess of $1 million—an award *416 times* Haslip's medical expenses. These standards, ill-defined at best, did nothing to protect Pacific Mutual from arbitrary action or to ensure the "fundamental fairness" that the Due Process Clause requires.

(b) This Court has not tolerated these constitutional infirmities in other contexts where juries have the power to mete out punishment. In the criminal context, for example, a jury can punish a defendant only after his

guilt has been proven beyond a reasonable doubt (*In re Winship*, 397 U.S. 358, 364 (1970))—a standard that stands in marked contrast to the preponderance of the evidence standard of liability in most civil cases. Criminal defendants, moreover, must receive fair notice of their punishment; unlike civil defendants in punitive damages cases, they need not speculate about the consequences of their conduct. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Smith v. Goguen*, 415 U.S. at 572-73; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). And, while juries in criminal cases do, of course, exercise some discretion in determining the severity of punishment, that discretion is—unlike the discretion accorded civil juries in punitive damages cases—limited by objective guidelines, including maximum statutory penalties.[5]

This Court should not tolerate punishment, in the punitive damages law context, without comparable due process protections. Though nominally civil, punitive damages are functionally penal. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2932 (O'Connor, Stevens, JJ., concurring in part and dissenting in part) ("[t]he Court's cases abound with the recognition of the penal nature of punitive damages"). "Punitive damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and

[5] In reviewing the role of the jury in criminal sentencing, this Court has emphasized the importance of providing guidance to protect against arbitrary and discriminatory sentences. *See Gregg v. Georgia*, 428 U.S. at 189 ("discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (the basic requirement of due process necessitates replacing "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable" jury determinations). Although courts have traditionally provided guidance to juries assessing punishment in criminal contexts, they have provided no similar guidance—or, at least, no useful guidance—to juries vested with the power to assess punitive damages, despite the fact that this Court has also recognized the necessity of due process protections in civil litigation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 433 (1982).

to deter its future occurrence.'" *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 87 (O'Connor, Scalia, JJ., concurring), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. They further few, if any, "legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979). That juries impose punitive damages in a civil action, rather than a criminal prosecution, neither changes their fundamentally penal character nor minimizes the need for constitutional protections. *See United States v. Halper*, 109 S. Ct. 1892, 1901 (1989); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981).

That the punitive award in this case was "penal" in a constitutional sense, so as to require enhanced procedural safeguards, is plain. Under Alabama law, punitive damages have no purpose other than to punish and deter. *See, e.g., Central Alabama Elec. Cooperative v. Tapley*, 546 So. 2d 371, 377 (Ala. 1989). Despite the penal, "quasi-criminal" character of punitive damages, none of the procedural safeguards mandated by due process accompanied the punitive award against Pacific Mutual. The jury penalized and stigmatized Pacific Mutual with a punitive award that it had no reason to expect; after all, Pacific Mutual did not even issue, much less cause the lapse of, the health insurance policy underlying Haslip's action. The jury, moreover, punished Pacific Mutual without the protection of an elevated standard of proof, e.g., "clear and convincing evidence." *See Santosky v. Kramer*, 455 U.S. at 756 (enhanced burden of proof is constitutionally required where proceedings threaten one of the parties with a significant stigma). It did so without the protection of standards limiting the level of punishment that it could inflict. And it did so not in a less prejudicial bifurcated trial, but in the same proceeding during which the jury decided Pacific Mutual's liability.

Where a law gives a jury standardless discretion to award punitive damages, imposes no guidelines for assessing the level of punishment, and authorizes poten-

tially substantial and destructive awards, the fundamental requirements of due process are surely violated. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Woodby v. INS*, 385 U.S. 276 (1966); *Addington v. Texas*, 441 U.S. 418 (1979). The law of a state as developed by its courts is clearly "state action." *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948). There is no doubt that the states have wide powers in making rules for public safety and their general polity. But there surely comes a point when the fundamental protections of the Fourteenth Amendment must be recognized. Only this Court can finally determine when that point has been reached.[6]

2. *Limited Judicial Review Of Excessive Punitive Damages Awards Does Not Cure The Constitutional Flaws In Punitive Damages Law*

Under the punitive damages laws of most jurisdictions, juries can and do "award any amount of punitive damages." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 87 (O'Connor, Scalia, JJ., concurring). Reviewing courts, moreover, vary unpredictably in their willingness to adjust those awards. Constrained by presumptions that jury verdicts are correct, these courts provide too little review based on loose standards, like the degree of the defendant's "culpability" and the "desirability" of deterrence (*see, e.g., Hammond v. City of Gadsden*, 493 So. 2d at 1379), that are as imprecise as

[6] Punitive damages law, as applied, also raises equal protection concerns. That law arbitrarily and irrationally singles out a class of defendants for punishment without the concomitant procedural safeguards available to criminal defendants. Unlike criminal defendants, defendants in punitive damages actions are denied heightened procedural safeguards, including an elevated standard of proof, limitations on the amount of penalties, pre-trial notice of charges, and bifurcated trials. *See Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting). This unequal treatment is inconsistent with the Equal Protection Clause. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 308-11 (1966) (state statute, applying only to incarcerated defendants and requiring them, but not other defendants, to repay the costs of transcripts used in unsuccessful appeals, violates equal protection).

the punitive damages instructions to the jury—and they provide that review too late. This absence of effective judicial review of excessive punitive damages awards only heightens the due process concerns that they raise and underscores the need for this Court's review.

The notion that reviewing courts can, consistent with due process, overturn excessive damages awards is established. This Court has overturned such awards, made pursuant to civil statutes, on numerous occasions where they were "grossly out of proportion to the possible actual damages" or "so arbitrary and oppressive that [their] enforcement would be nothing short of the taking of property without due process of law." *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 351 (1913); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *see also Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Chicago, Milwaukee & St. Paul Railway Co. v. Polt*, 232 U.S. 165, 168 (1914).

Reviewing courts should "look longer and harder" at the punitive damages awards of civil juries rendered in the absence of such statutory guidelines. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). If due process forbids excessive damages awards that fall within statutory limits chosen with the "benefit of a legislature's deliberation and guidance" (*id.*), as it surely does, so too should due process forbid excessive punitive damages awards that are solely the product of a jury's "discretionary moral judgment." *Smith v. Wade*, 461 U.S. at 52; *see Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. Indeed, awards of punitive damages made in the absence of statutory standards—many of which greatly exceed any comparable maximum statutory penalty[7]—are even

[7] Under Alabama's insurance code, for example, the monetary penalty for a willful violation of the title, which, *inter alia*, pro-

more "arbitrary" and deserve even greater judicial scrutiny.

This case amply demonstrates that current punitive damages law provides no such "hard" look. The Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), has indeed established "guidelines" for judicial review of excessive damages awards. But those guidelines provide neither a "hard" nor "long" look at punitive damages awards. "*Hammond* relates solely to the duty imposed upon the trial judge to make findings of fact and conclusions of law, either with or without a further post-trial evidentiary hearing." *Dunkin v. Smith*, 502 So. 2d 705, 708 (Ala. 1987). And *Hammond* merely suggests that trial courts should review punitive damages awards in light of, among other factors, the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," and the "impact upon the parties." *Hammond v. City of Gadsden*, 493 So. 2d at 1379.

In practice, these cosmetic "protections" against excessive awards add nothing new. Trial courts are not required to, and often do not, hold post-trial evidentiary hearings on damages. They routinely do not state for the record the factors that they considered in granting or denying a motion for a new trial based on the excessiveness of the verdict.[8] And, when they do so, their review is limited, for trial courts are required by law to give substantial deference to the jury's award and to " 'presume that the verdict [is] correct.' " *Charter Hosp. v.*

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scribes insurance fraud, is "a fine of not more than $1,000.00" (Ala. Code §§ 27-1-12, 27-12-17, 27-12-23 (1986))—one tenth of one percent of the punitive award in this case.

[8] As a result, the Alabama Supreme Court has remanded numerous cases for a statement of those reasons. *See, e.g., Dependable Ins. Co. v. Kirkpatrick*, 514 So. 2d 804 (Ala. 1987); *Hayes v. Payne*, 523 So. 2d 333 (Ala. 1987); *Sharp Electronics Corp. v. Shaw*, 524 So. 2d 586 (Ala. 1987); *Carnival Cruise Lines, Inc. v. Goodin*, 535 So. 2d 98 (Ala. 1988); *L.W. Johnson & Associates, Inc. v. Rivers Construction*, 532 So. 2d 618 (Ala. 1988).

Weinberg, 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990), quoting *Campbell v. Burns*, 512 So. 2d 1341, 1343 (Ala. 1987). Thus, the *Hammond* procedure does little, if anything, to enhance the depth of post-verdict review of excessive punitive awards—and does absolutely nothing to address the "constitutionally defective" jury process that produces excessive awards in the first instance (*see Charter Hosp. v. Weinberg*, 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990) (Houston, J., concurring specially)).[9]

In short, there is little proof that this post-award review in Alabama actually works. It certainly did not work in the instant case. *See* Pet. App. B16 (Maddox, Steagall, JJ., dissenting in part) (*Hammond* procedure is not "sufficient to accord to litigants all the due process protection the Constitution envisions"). And it has not worked in other post-*Hammond* cases in Alabama. *See, e.g., Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317 (Ala. 1987) ($5 million punitive damages award affirmed); *United American Ins. Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) ($1 million punitive damages award affirmed). Such procedures, therefore, do nothing to minimize the need for this Court's review.[10]

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[9] In any event, as this Court has noted (albeit in a different context), it is "unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the jury's factfinding function." *Beck v. Alabama*, 447 U.S. 625, 645-46 (1980).

[10] Nor does Alabama's recent legislation concerning punitive damages undermine the importance of review. On June 11, 1987, *after* the cause of action arose in this case, the Alabama legislature enacted a statute that places a $250,000 "cap" on punitive damages awards in certain types of cases, imposed a higher standard of proof for punitive damages awards, and disposed of the presumption of correctness afforded to punitive damages awards. Ala. Code §§ 6-11-20, 11-21, 11-23 (1989). Whether the Alabama courts will uphold this legislation is questionable. The Alabama Supreme Court has stated that "[t]o limit the jury's discretion other than by proper instruction as to the circumstances under which punitive damages are awarded would appear to violate the right of trial by jury guaranteed by Article I, § 11, of the Alabama Constitution of

3. *Imposing Due Process Limitations On Punitive Damages Law Will Not Impair The States' Interests In Compensating Victims And Punishing Wrongdoers*

Application of due process limitations to punitive damages law would not unduly intrude upon the states' interests in protecting their individual citizens. To be sure, a state does have a strong and legitimate interest in compensating private citizens for any *actual* harm that they suffer as a result of a defendant's misconduct. And a state likewise has a legitimate interest in punishing and deterring reprehensible and egregious actions toward its citizens. But current punitive damages law is not properly tailored to serve those interests.

As this Court has stated in a related context, a state has "no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349. Nor does a state have a legitimate interest in punishing defendants who caused or meant no harm. Under current punitive damages law, however, juries deprive civil defendants of their property—often based on conduct that is unintentional—and give it to victims who have already received full compensation for their injuries. As Chief Justice Rehnquist has aptly stated:

> It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudices of juries.

Smith v. Wade, 461 U.S. at 87-88 (Rehnquist, J., dissenting); *accord* American College of Trial Lawyers, *Report on Punitive Damages Of The Committee On Special Problems In The Administration Of Justice*, at 16 (1989) (concluding that no rational purpose is achieved by punishing persons or entities, under *respondeat superior* theory, where they did not participate in or ratify the wrongful conduct).

This case amply reflects the dangers of maintaining these "peculiarities" in punitive damages law and the urgent need for this Court's review. Under the liberal standard of *respondeat superior*, the Alabama Supreme Court allowed a jury to punish Pacific Mutual for the unauthorized and unratified acts of a non-exclusive agent—essentially an independent contractor—who misrepresented the nature of his agency, misrepresented the nature of the insurance that Pacific Mutual could write, and engaged in fraudulent conduct that Pacific Mutual expressly forbade. Absent review, other states, like Alabama, will continue to strike an improper balance between their interests in punishment and deterrence and the interests of civil defendants in securing adequate protections against similarly arbitrary punishment. Only this Court can properly accommodate those interests by defining the limitations that the Due Process Clause surely must place on punitive damages law.

1901." *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 837 n.2 (Ala. 1989). Recently, a federal district court certified to the Alabama Supreme Court the issue whether the $250,000 cap is constitutional. *Trawick v. Michaels of Oregon Co.*, No. 88-C-413 N (M.D. Ala.).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 1990